

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
CLERK, U.S. DISTRICT COURT
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SEP 07 2011

FLAGSHIP WEST, LLC, a California
limited liability company, MARVIN
G. REICHE, and KATHLEEN REICHE,

Plaintiffs,

v.

EXCEL REALTY PARTNERS, L.P., a
Delaware limited liability
partnership, and NEW PLAN EXCEL
REALTY TRUST, INC., a Maryland
corporation, et al.,

Defendants.

1:02-cv-5200 OWW DLB

MEMORANDUM DECISION AND ORDER
RE DEFENDANTS' MOTION TO
RECONSIDER MEMORANDUM
DECISION AND ORDER DATED JULY
5, 2011

(DOC. 530, 532)

I. INTRODUCTION

Before the court are (1) Excel Realty Partners, L.P.'s and
New Plan Excel Realty Trust, Inc.'s (together, "Defendants")
motion to reconsider the memorandum decision and order dated July
5, 2011 ("Memorandum Decision") (Doc. 530), and (2) Defendants'
opposition to Plaintiffs' proposed judgment (Doc. 532). Both
motions are opposed (Docs. 536, 533), and were heard August 22,
2011.

II. BACKGROUND

On February 28, 2011, Plaintiffs filed a request for entry
of judgment of rescission and for prejudgment interest. Doc. 518.
On March 17, 2011, Defendants filed a motion to strike

1 Plaintiffs' request for entry of judgment of rescission and
 2 request for prejudgment interest. Doc. 523. Both motions were
 3 opposed, and were heard May 23, 2011.

4 The Memorandum Decision dated July 5, 2011 (Doc. 529) denied
 5 Defendants' motion to strike and granted in part and denied in
 6 part Plaintiffs' request for entry of judgment of rescission and
 7 for prejudgment interest. The Memorandum Decision awarded
 8 Plaintiffs \$2,142,175 for damages in rescission, as follows:
 9

10	\$1,239,030	Construction Costs
11	\$ 589,271	Equipment Expenditures
12	\$ 30,000	Opening Inventory for Restaurant
13	\$ 104,176	Building & Related Fees
14	\$ 30,000	Franchise Fee
15	\$ 18,749	Training of Modesto Staff
16	\$ 27,956	Construction Interest
17	\$ 372,575	Rent Paid to Excel
18	\$ 186,394	Interest Paid After Opening
19	(\$ 434,716)	Credit for Rent Paid/Owed to Excel
20	(\$ 10,000)	Credit for Rental Income Credit
21	(\$ 11,260)	Credit for Equipment Sale
22	\$2,142,175	TOTAL

23 The Memorandum Decision granted Plaintiffs' request for
 24 prejudgment interest as to the \$214,350 interest paid on the
 25 Money Store loan (\$27,956 in construction interest and \$186,394
 26 in interest paid after opening) from the rescission date, and
 27 denied Plaintiffs' request for prejudgment interest as to the
 28 other unfixed components of Plaintiffs' damages award. The
 Memorandum Decision instructed Plaintiffs to submit a consistent
 proposed form or order, which Plaintiffs filed on July 11, 2011.
 Doc. 531.

III. MOTION FOR RECONSIDERATION

A. Legal Standard

Defendants' motion for reconsideration was filed July 7, 2011, two days after the Memorandum Decision was published. A motion for reconsideration filed within twenty-eight days of a judgment is treated as a Rule 59(e) motion. Fed. R. Civ. P. 59(e); see *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (applying Rule 59(e)'s ten-day deadline, before its 2009 expansion to twenty-eight days). Amending a judgment after its entry is "an extraordinary remedy which should be used sparingly." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). A motion for reconsideration under Rule 59(e) is properly granted where the district court: "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there was an intervening change in controlling law." *Id.*; *School Dist. No. 1J v. AC & S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A reconsideration motion is properly denied where it merely presents arguments previously raised in the prior motion or opposition. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

Local Rule 230(j) of the United States District Court,
Eastern District of California provides:

Whenever any motion has been granted or denied in whole or in part, and a subsequent motion for reconsideration is made

1 upon the same or any alleged different set of facts, counsel
2 shall present to the Judge or Magistrate Judge to whom such
3 subsequent motion is made an affidavit or brief, as
4 appropriate, setting forth the material facts and
5 circumstances surrounding each motion for which
6 reconsideration is sought, including:

7 (1) when and to what Judge or Magistrate Judge the
8 prior motion was made;

9 (2) what ruling, decision, or order was made thereon;

10 (3) what new or different facts or circumstances are
11 claimed to exist which did not exist or were not shown upon
12 such prior motion, or what other grounds exist for the
13 motion; and

14 (4) why the facts or circumstances were not shown at
15 the time of the prior motion.

16 B. Discussion

17 Defendant moves for reconsideration of the award of
18 \$589,271.00 in rescission damages for equipment expenditures. The
19 Memorandum Decision's grant of rescission damages was based on
20 the damages in the November 14, 2006 Order. Doc. 387. Defendant
21 points out that the court amended its November 14, 2006 Order on
22 May 30, 2007:

23 Excel's motion is GRANTED to the extent the November 14,
24 2006 Order states: "It is most reasonable to award
25 Plaintiffs the lower, but better-documented \$589,271 in
26 rescission damages for equipment, less any offset for
27 salvage." The Court intended to award \$581,526 in rescission
28 damages for equipment, less any offset [the \$11,260.00] for
salvage." The November 14, 2004 Order should have stated:
"It is most reasonable to award Plaintiffs the lower, but
better documented \$581,526 in rescission damages for
equipment, less any offset for salvage."

Doc. 424, 34. The award of \$589,271.00 in rescission damages for
equipment expenditures in the Memorandum Decision was clearly
erroneous, and should have reflected the court's May 30, 2007

1 order. The Memorandum Decision should have awarded "\$581,526 in
2 rescission damages for equipment, less any offset for salvage."

3 Defendants' motion for reconsideration is GRANTED.

4 IV. OPPOSITION TO PROPOSED JUDGMENT

5 A. Equipment Damages

6 Defendants repeat the objection to the award of rescission
7 damages for equipment expenditures. As stated above, the amount
8 of rescission damages for equipment expenditures in the judgment
9 should be "\$581,526 in rescission damages for equipment, less any
10 offset for salvage."
11

12 B. Date of Prejudgment Interest

13 Defendants contest Plaintiff's proposed date of rescission,
14 April 4, 2001. The Memorandum Decision granted prejudgment
15 interest on the \$214,350 paid on the Money Store loan from the
16 rescission date. Doc. 529, 15. Plaintiffs submitted a proposed
17 judgment granting "pre-judgment interest on \$214,350, at the rate
18 of \$58.73 per day, from and after April 4, 2001 through the date
19 of judgment" Doc. 531, 2.
20

21 Plaintiffs contend that Defendants have never contested the
22 date of rescission throughout ten years of litigation, and waived
23 it by failing to present it in opposition to Plaintiffs' request
24 for entry of judgment. The date of rescission, however, was not
25 at issue in Plaintiffs' request for entry of judgment.
26

27 Defendants contend that prejudgment interest should run from
28 November 14, 2006, not April 4, 2001. Defendants contend that

1 because Defendants did not know, and could not calculate the
2 amount due for Plaintiffs' interest payments prior to the court's
3 November 14, 2006 order, prejudgment interest should begin on
4 November 14, 2006. Defendants once again attempt to reargue their
5 opposition to Plaintiffs' request for prejudgment interest.
6 Defendants do not present newly discovered evidence, show that
7 the Memorandum Decision is clearly erroneous or manifestly
8 unjust, or point to any intervening change in controlling law.
9 See *Allstate Ins. Co. v. Herron*, 634 F.3d at 1111. Defendants'
10 argument will not be reconsidered. Prejudgment interest on
11 Plaintiffs' interest payments does not accrue from November 14,
12 2006.
13

14
15 Defendants contend that April 4, 2001 is irrelevant to the
16 issue of prejudgment interest because Plaintiffs never made an
17 unconditional demand for rescission on April 4, 2001. Plaintiffs
18 rejoin that Trial Exhibit 30, Plaintiffs' rescission notice,
19 establishes the rescission date as April 4, 2001.

20 Under California law, rescission of a contract is
21 accomplished by giving notice of the rescission and offering to
22 restore everything of value which the rescinding party has
23 received "or offer[ing] to restore the same upon condition that
24 the other party do likewise, unless the latter is unable or
25 positively refuses to do so." Cal. Civ. Code § 1691. "When notice
26 of rescission has not otherwise been given or an offer to restore
27
28

1 the benefits received under the contract has not otherwise been
2 made, the service of a pleading in an action or proceeding that
3 seeks relief based on rescission shall be deemed to be such
4 notice or offer or both." *Id.* "When a party gives notice of
5 rescission, it has effected rescission, and any subsequent
6 judicial proceedings are for the purpose of confirming and
7 enforcing that rescission." *Peterson v. Highland Music, Inc.*, 140
8 F.3d 1313, 1322 (9th Cir. 1998).

10 On April 4, 2001, Plaintiffs' counsel sent Defendant a
11 letter containing the following notice of rescission:

12 Flagship West demands that New Plan agree to remedy the
13 damages caused by its willful breaches. Flagship West
14 demands rescission of the lease, and to that end, Flagship
15 West has paid rent through March 31, 2001 and is willing to
16 tender rent due through the date of rescission, in return
17 for reimbursement by New Plan to Flagship West of all
18 damages which Flagship West has incurred. These damages
19 include rents paid to New Plan, costs of constructing the
20 building and other improvements, equipment costs, franchise
21 payments, the balance owing to Flagship West's lender and
22 other consequential and incidental damages. Alternatively,
23 Flagship West demands that New Plan immediately acknowledge
24 that the Lease is canceled and that New Plan pay the current
25 balance owing to the lender and reimburse Flagship West for
26 its losses and out-of-pocket costs.

27 Doc. 518-5, Ex. 23. The April 4, 2001 letter does not offer to
28 restore Defendants' property and benefits received under the
lease, as California Civil Code § 1691(b) requires. Service of a
pleading seeking relief based on rescission, however, will be
deemed "notice or offer or both." Cal. Civ. Code § 1691(b). On
April 27, 2001, Plaintiffs filed and served on Defendants a

1 Complaint seeking rescission. Doc. 1, ¶¶ 1-2. Under California
2 Civil Code § 1691, the date of service of Plaintiffs' Complaint,
3 April 27, 2001, is the date of rescission.

4 Defendants' opposition to the date of rescission is DENIED.
5 Prejudgment interest on the \$214,350 paid on the Money Store loan
6 shall accrue from April 27, 2001.
7


8 V. CONCLUSION

9 For the reasons stated:

- 10 1. Defendants' motion for reconsideration is GRANTED.
11 2. Defendants' objection to Plaintiffs' proposed judgment is
12 GRANTED in part and DENIED in part, as follows:
13 a. GRANTED as to the amount of rescission damages for
14 equipment; and
15 b. DENIED as to the date of rescission. Prejudgment
16 interest on the \$214,350 paid on the Money Store loan
17 shall accrue from April 27, 2001.
18 3. Plaintiffs shall submit an amended proposed form of
19 judgment consistent with this memorandum decision within
20 five (5) days following electronic service of this
21 memorandum decision.
22
23

24 SO ORDERED.

25 DATED: 9-7-11

26 
27 Oliver W. Wanger
28 United States District Judge